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RESERVATIONS TO TREATIES

Texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading

DRAFT RESOLUTION OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission,

Having considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations,

Aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights,

Wishing to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993,

1. Reaffirms its commitment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the object and purpose of the treaty as the most important of the criteria for determining the admissibility of reservations;

2. Considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. Considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

4. Nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. Also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

6. Stresses that this competence of the monitoring bodies does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the implementation of the treaties;

7. Suggests that consideration be given to providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or to elaborating protocols to existing treaties to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8. Notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations can not exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. Calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies have been granted authority to that effect;

10. Notes also that, in the event of incompatibility of a reservation with the object and purpose of a treaty, it is primarily the reserving State that has the responsibility of taking action. This action may consist, for example, in the State either foregoing becoming a party or withdrawing its reservation, or modifying the latter so as to eliminate the incompatibility;

11. Expresses the hope that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12. Emphasizes that the principles enunciated above are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

DRAFT CONCLUSIONS OF THE INTERNATIONAL LAW COMMISSION
ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES
INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission has considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations. The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions:

1. The Commission reaffirms its commitment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the object and purpose of the treaty as the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

6. The Commission stresses that this competence of the monitoring bodies does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the implementation of the treaties;

7. The Commission suggests that consideration be given to providing specific clauses in multilateral normative treaties, including in particular human rights treaties, or to elaborating protocols to existing treaties to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations can not exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies have been granted authority to that effect;

10. The Commission notes also that, in the event of incompatibility of a reservation with the object and purpose of a treaty, it is primarily the reserving State that has the responsibility of taking action. This action may consist, for example, in the State either foregoing becoming a party or withdrawing its reservation, or modifying the latter so as to eliminate the incompatibility;

11. The Commission expresses the hope that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12. The Commission emphasizes that the principles enunciated above are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER VI

STATE RESPONSIBILITY

1. At its 2477th meeting, on 15 May 1997, the Commission established a Working Group on State Responsibility 1/ to address matters dealing with the second reading of the topic.

2. The Working Group held two meetings from 20 May to 30 June. At its 2504th meeting on 3 July, the Commission considered and endorsed the report of the Working Group.

3. Since the topic deals with a number of important and delicate issues and Governments had not yet responded to the request for written comments (which were requested by 1 January 1998), the Working Group decided to limit its discussion to certain procedural and methodological issues viz. (i) the work plan of the topic within the present quinquennium; (ii) identification of any

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1/ Mr. J. Crawford (Chairman), Mr. I. Brownlie, Mr. J. Dugard, Mr. Q. He, Mr. P. Kabatsi, Mr. J. Kateka, Mr. T. Melescanu, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. B.Simma, Mr. C. Yamada and Mr. Z. Galicki (ex officio).

areas where more work was required, e.g. in the light of developments since the provisional adoption of the draft article in question; and (iii) the procedures to be followed for the second reading.

4. On the basis of the recommendation of the Working Group, the Commission decided:

(a) to design its work plan for the quinquennium with a view to allowing the completion of the second reading of the topic of State responsibility by the end of its quinquennium. To this end it agreed to give appropriate priority to this topic during the quinquennium;

(b) taking into account comments by Governments and having regard to the significant links which exist between various key issues to consider in 1999, if possible, the character of the draft articles;

(c) to follow the usual practice of the appointment of a Special Rapporteur to prepare reports for consideration by the Commission, bearing in mind in particular that a significant amount of inter-sessional work will be required;

(d) to proceed to the appointment of a Special Rapporteur for the topic at the present session;

(e) in its consideration of the topic, to follow the usual practice of debates in plenary followed by reference of articles to the Drafting Committee, and to expedite its work on the topic, following its recommendations for its methods of work, 2/ to establish working groups to consider and report on key issues;

(f) that comments by Governments are of particular relevance as regards the treatment of key issues;

(g) that an examination of case law and literature could also serve as a useful guide in determining whether there are any lacunae in the articles, or whether particular articles may require modification in the light of recent developments in international law, and the latter was particularly relevant to the articles of Part One completed in 1980.

2/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), paras. 203-220.

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

1. Pursuant to paragraph 6 of General Assembly resolution 51/160, the International Law Commission at its 2482nd meeting on 26 May established a Working Group [1] to consider the question of how the Commission should proceed with its work on this topic and to make recommendations to the Plenary to that effect.

2. The Working Group held two meetings from 2 to 13 June. It had before it the report of the 1996 Working Group of the Commission on international liability for injurious consequences arising out of acts not prohibited by

[1] Mr. C. Yamada (Chairman), Mr. E. Addo, Mr. E. Candioti, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. Q. He, Mr. J. Kateka, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Mr. P. Rao, Mr. B. Simma, and Mr. Z. Galicki (ex officio).

international law; [2] the Topical summary of the discussion held in the Sixth Committee at its fifty-first session; [3] and written comments submitted by Governments. [4]

3. At its 2496th meeting on 19 June, the Commission considered and endorsed the report of the Working Group which is reflected in paragraphs 4-6 below.

4. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". In the view of the Working Group, these two issues are distinct from one another, though relates. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.

5. The Working Group noted that the work of the Commission on "prevention" was already at an advanced stage and that many of the articles in that area had been provisionally adopted by the Commission. In the view of the Working Group, the Commission is now well placed to proceed with the work and possibly the completion of the first reading of the draft articles on "prevention" in the next few years. The Working Group also believes that any decision on the form and nature of the draft articles on "prevention" should be decided at a later stage.

6. In the Working Group, it was widely viewed with some differing shades that "international liability" is the core issue of the topic as originally conceived and that the Commission should retain this subject. At the same time, it was agreed that the Commission needs to await further comments from the Governments before it can make any decision on the issue. It was also noted that the title of the topic might need adjustment depending on the scope and contents of the draft articles.

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[2] See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, (A/51/10), Annex I.

[3] A/CN.4/479, sect. C.

[4] A/CN.4/481 and Add.1.

7. On the basis of the recommendation of the Working Group the Commission decided:

(a) to proceed with its work on "international liability for injurious consequences arising out of acts not prohibited by international law", undertaking first prevention under the subtitle "Prevention of transboundary damage from hazardous activities", and to appoint a Special Rapporteur as soon as possible;

(b) further to reiterate its request for comments of Governments if they have not previously done so on the issue of international liability in order to assist the Commission to finalize its view.

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UNILATERAL ACTS OF STATES

Report of the Working Group

1. In the report on the work of its forty-eighth session, the International Law Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. 1/

2. The General Assembly, in resolution 51/160, invited the Commission to examine the topic "Unilateral acts of States" and to indicate its scope and content, in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to submit.

3. At its 2477th meeting, held on 15 May 1997, the Commission established a Working Group on this topic. 2/ The Group held 3 meetings between 22 May and 26 June 1997.

1/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 230 and pp. 328-329.

2/ Mr. E. Candioti (Chairman), Mr. J. Baena Soares, Mr. J. Dugard, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. N. Elaraby, Mr. G. Hafner, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. B. Sepúlveda and Mr. Z. Galicki (ex officio).

GE.97-62553 (E)

4. The Group bore in mind the "General outline" for the study of unilateral acts of States submitted by the Commission in annex II, addendum 3, to its report on the forty-eighth session, 3/ as well as the summary records of the debate in the Sixth Committee at the fifty-first session of the General Assembly. 4/

I. Advisability and feasibility of the study

5. The Working Group took the view that consideration by the International Law Commission of "unilateral acts by States", with a view to initiating work on the codification and progressive development of the applicable legal rules, is advisable and feasible, bearing in mind, inter alia, the following reasons:

In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States; State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts; there is thus sufficient material for the Commission to analyse and systematize. In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.

II. Scope and content of the topic

6. In the light of the General Assembly's request in operative paragraph 13 of resolution 51/160, the Working Group concentrated on determining the scope and content of the topic.

A. Scope

7. The conduct of States in the international sphere is constantly seen in individual initiatives and unilateral actions with many objectives, forms and

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3/ Document A/51/10, pp. 343-347.

4/ Document A/CN.4/479, para. 96.

types of content. This conduct encompasses political, economic, cultural, social, defence, security and other action, in other words, the whole range of activities whereby each State expresses itself and operates in its external relations. The Working Group's first task was, therefore, to endeavour to delimit the subject of study, in other words, to establish what kind of unilateral acts by States should be the subject of attention.

8. The Group bore in mind that, in the General Scheme included in annex II to the report on its forty-eighth session, the Commission basically characterized the subject of study as unilateral acts of States that have consequences relating specifically to the sphere of international law. 5/ This framework is repeated in the General Outline submitted in addendum 3 to the annex. 6/

9. Accordingly, the topic is the unilateral acts of States that are intended to produce legal effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations. The study should therefore rule out those State activities which do not have such legal consequences. It would also seem appropriate to rule out, at the same time, questions pertaining to the definition and consequences of internationally wrongful acts, inasmuch as they are studied under the heading of international responsibility.

10. The fundamental characteristic of unilateral legal acts is, logically, their unilateral nature. They emanate from one single side (from the Latin "latus"), in other words, from one or several subjects of international law acting "unilaterally" and the participation of another party is not required. This characteristic, which is to be seen both in the structure and in the object and content of the act, leaves "plurilateral" international legal acts, such as treaties, outside the scope of the study. But it does not exclude so-called "collective" or "joint" acts, inasmuch as they are performed by a plurality of States which do not intend to regulate their mutual relations by this means, but to express, simultaneously or in parallel

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5/ Document A/51/10, p. 329.

6/ Idem, p. 343.

fashion, as a unitary block, the same willingness to produce certain legal effects without any need for the participation of other subjects or "parties" in the form of acceptance, reciprocity, etc.

11. The reference in the title of the topic to unilateral acts of States also means, in principle, ruling out from the purview of this study unilateral acts carried out by other subjects of international law and, in particular, the very important and varied category of such acts by international organizations. The general scheme in the Commission's report on its long-term programme of work 7/ includes, as other possible topics for future study, under the heading of the law of unilateral acts, the law applicable to resolutions of international organizations and control of their validity. Detailed treatment of unilateral acts of international organizations could thus, in due course, be considered as a possible subject for future work.

12. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, etc., States carry out acts which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Group nonetheless considered that the characteristics and effects of such acts are governed by the law of treaties and do not need to be dealt with further in the context of the new study proposed.

13. Similar arguments were presented in discussing the possible inclusion of unilateral acts carried out by States in the context of international justice. Mention was made in particular of the characterization of acceptance of the optional clause in Article 36, paragraph 2, of the Statute of the International Court of Justice as a unilateral act. The Working Group was inclined to leave this category of acts out of the study taking the view that such acts have a treaty basis.

14. The same position was taken with regard to internal acts (laws, decrees, regulations) that do not have any effect at the international plane. However, internal acts that may have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction (territorial sea, contiguous zone, economic zone, baselines, etc.), should be included to the extent that such unilateral acts create legal situations which are opposable to other States and are permitted by international law.

7/ Document A/51/10, p. 329.

15. The Working Group took account of the important interaction between unilateral acts of States and custom, but preferred not to decide a priori on including or excluding acts which may be elements that could contribute to the formation of customary law. This question will need to be clarified as the study of the topic is taken further.

16. The Group also scrutinized the question of the terms used to denominate the subject of the study and, as a consequence, the necessity or advisability of changing the title of the topic. It considered the various expressions used by writers and in judicial decisions, namely, "unilateral acts", "unilateral declarations", "unilateral engagements", "unilateral obligations", "unilateral legal acts", "unilateral transactions", and so on. Mention was also made of alternatives to omit the adjective "unilateral", because of any extra-juridical connotations. At this time, it was considered that the best course was to move ahead with the substantive definition and basic characterization of the phenomenon to be analysed and to determine its juridical nature and its constituent elements. In this regard, at this initial stage the expression "unilateral legal acts of States" seems to be the one that points best to what the Commission had in mind in proposing this topic.

17. The positions taken by the Working Group on the issues mentioned in the foregoing paragraphs are of a preliminary nature, since a definitive assessment of the scope of the work to be done can be made only after a detailed analysis of all aspects of the topic.

B. Content

18. The Working Group considered that the main objective of the study is to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant for particular types or categories of such acts.

19. The Working Group was of the opinion that the general outline proposed in addendum 3 to the Commission's 1996 report constitutes a basis for the study that will have to be improved as work on the topic moves ahead. For the time being, the Working Group has confined itself to redrafting the outline by including a few additions in a second version which is reproduced

below, on the understanding that the further development and organization of the topic are to be dealt with in the first report that the Commission could request, as suggested in paragraph 22 below.

III. Outline for the study of unilateral legal acts of States

Chapter I. Definition of unilateral legal acts of States:

Determination of their basic elements and characteristics:

(i) Attribution of the act to a State as a subject of international law;

(ii) Unilateral nature of the act;

(iii) Normative content: expression of will, with intent to produce international legal effects;

(iv) Publicity of the expression of will;

(v) Binding force recognized by international law.

Chapter II. Criteria for classifying unilateral legal acts of States:

(i) In terms of their substantive content and their effects;

(ii) In terms of the addressee (acts addressed to one, several or all subjects of international law);

(iii) In terms of form (written or oral, explicit or tacit).

Chapter III. Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice.

(i) Unilateral promise or engagement;

(ii) Unilateral renunciation;

(iii) Recognition;

(iv) Protest;

(v) Others.

Chapter IV. General rules applicable to unilateral legal acts:

(a) Forms:

(i) Declarations, proclamations and notifications, written or oral;

(ii) Conduct.

(b) Effects:

(i) Binding nature of the unilateral act for the author State;

(ii) Creation of rights for other States;

(iii) Renunciation of rights of the author State;

(iv) Situations of opposability and non-opposability.

(c) Applicable rules of interpretation.

(d) Conditions of validity:

(i) Capacity of State organs or agents to perform unilateral legal acts;

(ii) Effects in the international sphere (as opposed to purely internal acts);

(iii) Lawfulness under international law;

(iv) Material possible content;

(v) Publicity;

(vi) Absence of defects in the expression of will.

(e) Consequences of the invalidity of an international legal act:

(i) Nullity;

(ii) Possibility of validation.

(f) Duration, amendment and termination:

(i) Revocability. Limitations on and conditions of the power of revocation and review;

(ii) Amendment or termination because of external circumstances: Termination as a result of fundamental change of circumstances; Idem as a result of impossibility of application; Existence of a new peremptory norm;

(iii) Effects of a succession of States.

Chapter V. Rules applicable to specific categories of unilateral legal acts of States

IV. Plan of work

20. The Working Group took the view that this new topic should be considered in such a way that the first reading of a draft may be completed within the quinquennium of the present Commission.

21. To this end, the Working Group considered it advisable that the Commission should appoint a special rapporteur at the current session.

22. The Commission would then entrust the Special Rapporteur with the task of preparing a general outline of the topic which would be included in an initial report to be submitted for discussion in 1998 and which would contain:

(a) A brief description of the practice of States, past and present, with examples of the main types of unilateral legal acts that are relevant to the study;

(b) A survey of the consideration of this category of acts by international courts and of the opinions and conclusions of writers who have dealt with the topic; and

(c) A detailed scheme for the substantive development of the topic.

23. The Working Group also considered that, in preparing the initial report, the Special Rapporteur might be assisted by a small consultative group of members of the Commission, as the Commission suggested. 8/

24. After discussing the initial report at its fiftieth session, the Commission might submit it for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating, inter alia, its views on what the outcome of the work might be: a doctrinal study, draft articles, a set of guidelines or recommendations or a combination of the above.

25. The Commission might propose in its report on the current session that the General Assembly should invite Governments to make their opinions known, both in the Sixth Committee and separately in writing, and provide as soon as possible information they consider relevant for the study of the topic: the importance, usefulness and value each State attaches to its own and others' unilateral legal acts in the international sphere; the practice and experience of each State in this regard; Government documentation and judicial decisions that should be taken into account; opinion on whether the final result should be a doctrinal report, a list of recommendations or guidelines for the conduct of States or a set of draft articles; the degree of priority or urgency that States attach to this work; commentaries and observations on the scope and content of the study; etc.

26. In subsequent reports (in early 1999, early 2000 and, possibly, early 2001), the Special Rapporteur might complete the various chapters and finalize the first full presentation of the study, proposing, as appropriate, the corresponding draft articles. This would enable the Commission to complete the first reading and submit its conclusions and recommendations to the fifty-sixth session of the General Assembly, i.e. before the term of office of the current members ends.

8/ See para. 194 of the report of the International Law Commission on the work of its forty-eighth session, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10).

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER V

RESERVATIONS TO TREATIES

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A. Introduction

1. The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work at its forty-sixth session (1994) the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 1/

3. At its forty-seventh session, the Commission received the first report of the Special Rapporteur on the topic. 2/ It discussed the report at its 2400th to 2404th meetings, at its 2406th and 2407th meetings and at its 2412th and 2416th meetings.

4. Following that discussion, the Special Rapporteur summarized the conclusions he drew from the Commission's consideration of the topic; they related to the title of the topic, which should now read: "Reservations to treaties"; the form the results of the study would take; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. 3/ In the view of the Commission, these conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.

5. At its 2416th meeting on 13 July 1995, the Commission, in accordance with its earlier practice, 4/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. This questionnaire would be sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the

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1/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 382.

2/ Doc. A/CN.4/470 and Corr.1.

3/ Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10), para. 491.

4/ See Yearbook of the International Law Commission, 1993, vol. II (Part Two), para. 286.

Commission's conclusions, inviting it "to continue its work ... along the lines indicated in its report" and also inviting States to answer the questionnaire. 5/

6. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic. 6/ The Special Rapporteur had included in his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to clarifying the legal aspects of the matter. 7/ The Special Rapporteur submitted that report to the Commission at its 2460th meeting, held on 16 July 1996. Owing to the lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members were able to express their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

B. Consideration of the topic at the present session

7. At the present session, the Commission again had before it the Special Rapporteur's second report on the topic. It considered the report at its 2487th meeting held on 3 June 1997 and at its 2499th to 2503rd meetings held on 25, 26, 27 June and 1 and 2 July 1997.

8. As the composition of the International Law Commission had changed significantly since the elections of 18 November 1996, the Special Rapporteur introduced his second report once again.

(a) Introduction by the Special Rapporteur of his second report

(i) Historical background

9. Because of the presence of so many new members in the Commission and because so much time had elapsed since the Commission had considered his first

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5/ As at 30 June 1997, thirty (30) States and eighteen (18) international organizations had answered the questionnaire.

6/ A/CN.4/477 and Add.1.

7/ Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), para. 137.

report, 8/ the Special Rapporteur gave an overview of the topic and the decisions taken, expressing the hope, however, that those decisions would not be called into question by the Commission or by the Sixth Committee.

10. The Special Rapporteur recalled that the topic of reservations to treaties was not *terra incognita* for the Commission, which had already considered the question on a number of occasions. In that connection, he referred to the 1951 study by James Brierly which took a view that ran counter to the solution which had been adopted by the International Court of Justice in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 9/ and abided by the old strict consensual system of unanimous acceptance of reservations. Sir Humphrey Waldock's 1962 report 10/ reversed the trend in the Commission and led it to adopt the more flexible system which was based on Latin American practice (as reflected in the above-mentioned advisory opinion), resulting in the regime of the Vienna Conventions constituted by article 2, paragraph 1 (d), and articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties and supplemented in 1978 by the Vienna Convention on Succession of States in respect of Treaties (art. 20) and by the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (art. 2, para. 1 (d) and arts. 19 to 23). The flexibility and adaptability of that system, which reflected current positive law in the matter and whose residual nature, even for the States parties to the Vienna Conventions, was a basic feature, had enabled it to work very smoothly. It could therefore be asked whether there was any point in considering the question of reservations again.

11. The Special Rapporteur recalled that, following a suggestion by two States in the Sixth Committee 1990, the Commission's Planning Group had taken the view in 1992 that that suggestion should be adopted. In 1993, the future Special Rapporteur had prepared a general outline (A/CN.4/454) indicating the main problems that had been raised, the relevant instruments, existing doctrine and the advantages and disadvantages of codification. The conclusion

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8/ A/CN.4/470.

9/ *I.C.J. Reports 1951*, p. 15.

10/ *Yearbook ... 1962*, vol. II, p. 27.

of the outline that a detailed study of the topic was justified had been endorsed by the Commission and by the General Assembly in its resolution 48/31 of 9 December 1993. As a result of that resolution, the Commission had appointed the Special Rapporteur for the topic at its forty-sixth session and he had prepared a preliminary study (A/CN.4/470 and Corr.1 and 2) on the Commission's earlier work on the Vienna Conventions, an inventory of the problems posed by the topic and the scope and form of the Commission's future work.

(ii) Ambiguities and lacunae of the "Vienna regime"

12. The Special Rapporteur noted that, although the Vienna regime generally worked satisfactorily, the ongoing and perhaps insoluble doctrinal "quarrel" between the opposability school and the permissibility school 11/ showed that there were ambiguities and uncertainties with regard to reservations that the regime could not remove. Moreover, the practical consequences of that disagreement as to the permissibility and opposability of reservations might differ greatly, depending on the position the two schools took.

13. These uncertainties were based on three main questions, namely:

(a) Acceptance of reservations;

(b) Objections to reservations; and

(c) The effects both of the acceptance of reservations and of objections to reservations,

not to mention key problems connected with conditions of permissibility or impermissibility of reservations and the determination thereof. 12/

14. Quite a few gaps also continued to exist and related, inter alia, to the definition of reservations and interpretative declarations, reservations to provisions codifying jus cogens, the fate of reservations, acceptances and objections in the event of State succession, the settlement of disputes

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11/ The advocates of opposability considered that the only criterion for the validity of a reservation was that of the objections of other States, while those of permissibility took the view that a reservation contrary to the object and purpose of the treaty was null and void in itself, irrespective of the reactions of the other contracting States.

12/ For a fuller list of "ambiguities", see the first report (A/CN.4/470, para. 124).

related to the regime of reservations and the rules applicable, where appropriate, to reservations to some categories of treaties and, in particular, human rights treaties. 13/

(iii) Future work on the topic

15. The Special Rapporteur recalled that the direction the future work would take was affected by the relationship between that work and the existing conventions and by the form of its results. In his first report, he had not taken a very clear-cut position on the form the results of the Commission's work should take, indicating simply that there was a fairly wide range of possibilities, including additional protocols to the existing conventions and model clauses or a combination of those different approaches. 14/ He also referred to the conclusions 15/ he had drawn from the debates which had been held at the Commission's forty-seventh session and which might be summarized as follows:

(a) First, the achievements codified by the regime of the Vienna Conventions should be preserved, since they established a satisfactory balance that worked well, containing as they did rules of reference which, irrespective of their nature at the time of their adoption, could be regarded as having acquired a customary value; and

(b) Secondly, the Commission should in principle adopt a guide to practice in respect of reservations whose provisions would be guidelines for the practice of States and international organizations on that question. 16/

16. The Special Rapporteur referred to General Assembly resolution 50/45, 17/ which took note of those conclusions. He also recalled that most, if not all, delegations at the fiftieth and fifty-first sessions of the General Assembly had expressed views that had been remarkably similar to

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13/ See, in this connection, paragraphs 148 and 149 of the first report (A/CN.4/470) and paragraphs 10 and 19 of the second report (A/CN.4/477).

14/ A/CN.4/470, para. 182.

15/ See also para. 4 above.

16/ See Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 491, and doc. A/CN.4/477, para. 2.

17/ See para. 5 above.

those expressed by the members of the Commission both on the need to preserve the achievements of the Vienna regime, which established a satisfactory balance, and on the order of importance of the problems to which it gave rise - or which it left pending.

(iv) General outline of the study and form of its results

17. The Special Rapporteur indicated that the order of importance of the problems was what had "dictated" chapter I of his second report, "Overview of the study", which was devoted to the future work of the Commission on the topic and contained a provisional general outline of the study.

18. According to the Special Rapporteur, those problems 18/ were also part of a broader set of problems that the Commission could not leave aside. That was also why the general outline of the study, 19/ which gave as full as possible an overview of the topic, was strictly provisional and not intended to be either final or even complete. The Special Rapporteur stated that he was aware of the perilous nature of the exercise, particularly in view of the complexity and technicality of the topic and the politically very sensitive nature of some of its aspects. He had therefore tried to define the objectives of the general outline of the study in a more pragmatic than doctrinal spirit. 20/

19. The Special Rapporteur also said that he had no illusions about the ambitious nature of his plan, even though it was entirely provisional. In that connection, he had wanted to be able to submit two reports to the Commission in 1998: one on the definition of reservations and the distinction between them and interpretative declarations, as well as on the formulation and withdrawal of reservations, acceptances and objections and the other, if that was possible, on the effects of reservations, acceptances and objections.

20. The results of the study, namely, the guide to practice in respect of reservations, would, in accordance with the position adopted by the Commission, take the form of a set of draft articles with commentaries

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18/ See also A/CN.4/477, para. 10. (See "Ambiguities and lacunae", paras. 11-13 above).

19/ A/CN.4/477, paras. 37 et seq.

20/ Ibid., para. 34.

accompanied by model clauses, if necessary. 21/ The draft articles would be prefaced by provisions on reservations already included in the 1969, 1978 and 1986 Vienna Conventions, firstly, to give the guide to practice a comprehensive nature and, secondly, to ensure that it was consistent with what already existed. The model clauses could serve as models for States and international organizations which wanted to include them in the treaties that they would conclude in future if they needed to have recourse to special clauses derogating from ordinary law in certain specific areas. Those model clauses should be designed to keep possibilities of disputes to a minimum in future.

21. The Special Rapporteur recalled that his second report contained three appendices. The first 22/ contained a long bibliography on the topic that would be completed in future. The two others contained the two questionnaires that the Commission had authorized him to send, through the secretariat, to States and international organizations to determine what practice they followed in respect of reservations.

(v) The question of the unity or diversity of the legal regime for reservations to treaties, more particularly in relation to human rights treaties

Legal regime of reservations to treaties and normative treaties

22. Chapter II of the report dealt with two substantive matters which were nonetheless closely linked, namely, the question of the unity or diversity of the legal regime for reservations to treaties, and second, the specific question of reservations to human rights treaties. In the context of the latter, the question also arose of consideration of the powers of human rights treaty monitoring bodies. In that regard, the Special Rapporteur was of the view that the Commission should draw firm and clear conclusions. The reactions of States in the course of the debate in the Sixth Committee at the fifty-first session of the General Assembly tended to favour the conclusions set out in his second report. Furthermore, the extreme importance and

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21/ A/CN.4/477, paras. 19-32.

22/ Doc. A/CN.4/478.

topicality of the subject, 23/ as well as the fact that a number of human rights treaty monitoring bodies had deferred any decision on the matter pending the outcome of the Commission's work, 24/ militated in favour of a stance on the part of the Commission. The Special Rapporteur also said that some new elements in the debate, although they had in the main backed up his positions, had nonetheless induced him to qualify them to some extent.

23. Taking up first the question of the unity or diversity of the reservations regime, the Special Rapporteur discussed the necessity of modifying the reservations regime to take account of the object and/or nature of the treaty. He pointed out that the basis for the reservations regime consisted of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, provisions that were later reproduced in the 1986 Convention (arts. 19-23). He also noted that the Convention provided that special rules were applicable to certain categories of treaties. 25/ Consequently, the problem of the unity or the diversity of the rules applicable to reservations had not escaped the authors of the Vienna Convention, who had not failed to differentiate them where they had deemed it necessary. Furthermore, where the authors of the Vienna Convention had wanted to reserve special treatment for a specific category of treaty, they had expressly done so. 26/ Those authors, mindful of the fact that a general rule could not ideally apply to all treaties, had devised them with the idea that they would apply to all multilateral treaties, with the exception of expressly named categories of treaties. 27/

23/ The Special Rapporteur mentioned the recent symposium organized in Cambridge in March 1997 by Professor James Crawford in collaboration with Professor Alston, and the symposium of the Société Française de Droit International on the subject of "International law and human rights".

24/ Like the Committee on the Elimination of All Forms of Discrimination against Women, at its sixteenth session, in January 1997.

25/ Article 20, paras. 2 and 3, set out specific conditions governing the permissibility of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations.

26/ As in the case of article 60, para. 5.

27/ See paras. 99-111 of the second report (A/CN.4/477/Add.1).

24. The Special Rapporteur nonetheless pointed out that no exception had seemed worthwhile with regard to the applicability of the regime in the case of normative treaties such as codification conventions or human rights treaties, although the latter had their own characteristics of a most striking non-synallagmatic nature.

25. He pointed out that the problem had resurfaced in the meanwhile and that a number of writers had argued that the Vienna regime was not applicable to reservations to normative treaties and more particularly to human rights treaties. That idea had spread, even to human rights bodies, and deserved to be considered in turn by the Commission, one of the "international law bodies".

26. In that regard, the Special Rapporteur emphasized that the so-called "normative" treaties, which corresponded to an earlier concept, that of "law-making" treaties, was a very diverse category, consisting of conventions codifying private international law, ILO conventions, treaties on the law of armed conflict, trade, and so on. Furthermore, a treaty was rarely entirely normative or entirely synallagmatic: in most cases, including human rights, 28/ a treaty contained both contractual clauses recognizing reciprocal rights and obligations and "normative" clauses. From that standpoint, a normative treaty was simply a treaty in which the normative provisions predominated in quantitative terms.

27. The Special Rapporteur pointed out that the problem therefore was to determine whether the Vienna reservations regime was suited to the "normative provisions" of treaties, and section II of his report endeavoured to provide an answer, both *de lege lata* and *de lege ferenda*.

28. He also mentioned the ILC reports of 1962 and 1966, in which the Commission had recognized the value of formulating rules applying to the greatest possible number of cases. 29/ The Vienna Conference had also

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28/ A quintessential human rights treaty such as the Convention on Genocide, the very archetype of a normative treaty according to the ICJ decisions of 1951 and 1996, contains elements of reciprocity.

29/ *Yearbook* ... 1962, vol. II, doc. A/5209, p. 180; *Yearbook* ... 1996, vol. II, doc. A/6309/Rev.1, p. 206.

endorsed those views, influenced by Latin American practice, because of their flexibility and adaptability, which were also characteristic of the whole of the Vienna regime.

29. Three mechanisms, he said, ensured such flexibility and adaptability, namely (a) the prohibition (article 19 (c) of the Convention) on formulating a reservation incompatible with the object and purpose of the treaty, a general rule that precluded any rigidity by referring to the very essence of the treaty; (b) the system of freedom instituted under article 20 (4) and (5) and articles 21 and 22 enabling States parties not to be affected by the reservation, since they could decide to object to it, and lastly; (c) the residual character of the system, a fundamental feature which enabled the Vienna regime to operate not as a yoke but as a safety net. (This feature meant that the system could be set aside if States so wished.)

30. The Special Rapporteur drew two major conclusions from his analysis:

(a) The endless debate on whether or not reservations to treaties should be allowed was futile. Reservations to treaties were a fact of life; the Vienna rules, by their very flexibility, precluded any basic "deformation" of the treaty yet at the same time allowed for the broadest possible participation. It was better for a State to accept part of a treaty than simply decide not to become a party;

(b) There was no reason to rule out the application of the Vienna regime to so-called "normative" treaties. 30/

31. The Special Rapporteur, summing up his analysis in paragraphs 136 to 162 of his second report, pointed out that, even if reservations prejudiced the integrity of the treaty, they could never prejudice its object and purpose, namely, its very "core"; otherwise they would be impermissible. Moreover, that integrity was typical not only of normative treaties but also of synallagmatic treaties. As to the argument about the non-reciprocal character of normative treaties, the Special Rapporteur found it paradoxical that the criticism levelled at reservations, namely that they did away with reciprocity, should be made in the case of commitments which, by their very nature, were not reciprocal! In any case, the reciprocity element was not entirely absent from normative treaties whereby the States mutually guaranteed that they would apply the same rules. Moreover, the Special Rapporteur

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30/ See the first report (A/CN.4/470) para. 163.

considered that the argument about a break in equality between the parties to normative treaties, a break allegedly caused by the fact that reservations could be entered, was just as specious: the inequality would be much more flagrant between a State party and a State which was not at all a party to a normative treaty. Lastly, a State could always restore the initial balance by objecting to the reservation or by taking action under article 20, paragraph 4 (b), of the 1969 Convention and preventing the treaty from entering into force between itself and the reserving State.

(vi) Vienna regime and human rights treaties

32. In the light of those conclusions, the Special Rapporteur wondered whether, on the other hand, special rules would be applicable to the "special" category of normative treaties formed by human rights treaties. In that regard, he pointed out that, despite the eloquent pleading by human rights specialists for a regime specific to reservations to human rights treaties, 31/ none of the arguments offered a convincing basis for such a specific regime. In actual fact, it was the lacunae and the ambiguities of the Vienna regime that were questioned, lacunae and ambiguities of the general regime and not its application to certain categories of treaties.

33. The Special Rapporteur pointed out that his answer to the question whether there had been crucial reasons for not applying the Vienna regime to human rights treaties had been in the negative. 32/ In summing up the reasons why he had deemed it advisable to answer in that way, he mentioned the following points:

(a) The Vienna regime was designed to be applied universally and without exception. Moreover, it should not be forgotten that the point of departure, namely the ICJ Advisory Opinion on reservations to the Genocide Convention, concerned a quintessential human rights treaty;

31/ The above-mentioned symposium held by the Société Française de Droit International on international law and human rights, see footnote 23 above.

32/ See the second report (A/CN.4/477/Add.1) paras. 165-176.

(b) In the time since the Vienna Conventions, neither the practice of States inter se, 33/ nor judicial practice nor even the human rights treaty bodies had contested the applicability of the Vienna regime to human rights treaties. What was more, the majority of the human rights treaties concluded after the Vienna Conventions either contained express clauses on reservations referring to the Vienna Convention or reproducing the Convention's criteria of the "object and purpose" of the treaty, or contained no clauses on reservations, but entailed the effective application of the Vienna regime as an expression of the "ordinary law", something that was also apparent from the travaux préparatoires of those instruments. 34/ In that regard, the Special Rapporteur pointed out, even General Comment No. 24 of the Human Rights Committee, which had been challenged on other points, referred on a number of occasions to the Vienna Conventions.

34. However, the Special Rapporteur qualified these conclusions by the following considerations:

(a) It was not inconceivable that States parties to human rights treaties would want to make exceptions or establish special regimes. For that purpose, it would be wise in future for States to stipulate expressly in human rights conventions whether and to what extent non-application of a provision constituted a breach of the "object" of the conventions;

(b) A fruitful dialogue might be established between the reserving State and the objecting State, either spontaneously or on the basis of special provisions inserted in the treaty for that purpose. That technique would strike a balance between the reservations regime and the specificity of human rights;

(c) Human rights monitoring bodies would nonetheless continue to apply the Vienna rules in regard to reservations when no special rules existed.

33/ The Special Rapporteur recalled that, in the course of the debate in the Sixth Committee, almost all States commenting on his report had confirmed that position.

34/ With the exception, of course, of treaties which, like the International Convention on the Elimination of All Forms of Racial Discrimination, contained special clauses on reservations.

(vii) The role of monitoring bodies in regard to reservations

35. The Special Rapporteur emphasized that the third part of his report dealt with the most controversial question, namely the role of the human rights treaty monitoring bodies in regard to the permissibility of reservations.

36. He recalled that there were two entirely opposed positions. One was that the States parties alone were competent to decide on the admissibility and validity of reservations: that was the traditional position of States, 35/ of the Legal Counsel of the United Nations, of part of doctrine and even the monitoring bodies themselves up until the mid-1990s.

37. The other position, however, was that not only were the monitoring bodies competent to decide whether reservations were permissible but they could also draw all the necessary consequences of that determination, including the fact that reserving States were bound by all the provisions of the treaty, including the provision in respect of which they had entered the reservation.

38. The Special Rapporteur said that neither of those positions seemed satisfactory to him. In his opinion, it was incumbent on the Commission, as an international law body, to provide an answer based on law.

39. He said that, in his view, two findings would provide grounds for such an answer:

(a) Human rights bodies could and should assess whether reservations were permissible when that was necessary for the exercise of their functions. They could not, however, have more competence in that regard than was necessary for them to discharge their main responsibility. In that respect, he pointed out that bodies to monitor and implement a treaty were not a feature of human rights treaties alone and could and did exist in other fields (disarmament, environment, etc.). Like a dispute settlement body which could and should, in a dispute brought before it, rule on the validity of a reservation, otherwise it could not perform its task, 36/ all such control bodies, including human rights bodies, were created or required by the parties

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35/ This position is reflected in the comments of the three States on General Comment No. 24 (A/50/10 and A/51/10).

36/ As was true, for example, in the Mer d'Iroise case between France and the United Kingdom.

to monitor the implementation of the treaty. For that purpose, they had to determine the specific obligations of parties under the treaty, including reservations. If the bodies were jurisdictional (such as the European Court of Human Rights), they had the power to make decisions binding on the parties concerned. If they were consultative in character, their opinion would not be binding, but the States parties should consider the opinion in good faith;

(b) Moreover, the Special Rapporteur was convinced that the competence of such bodies stopped there. It followed that they could not draw any *consequences* from such an assessment in the absence of a decision by the State concerned.

40. In contrast to the positions adopted by some human rights bodies which considered that once the reservation was deemed impermissible the reserving State continued to be bound by the treaty as a whole, he emphasized that the treaty was still a *consensual* instrument, drawing its strength from the *will* of States. 37/ The reservations made, he said, were "consubstantial" with the State's consent to be bound by the treaty. In international society at the present stage, the State *alone* could know the exact role of its reservation to its consent. It was neither possible nor desirable, said the Special Rapporteur, for *experts* - whose legitimacy drew on the treaty (hence on the will of States) - to replace elected Governments in deciding on the intentions of those Governments.

41. However, on reflection he had departed in one respect from the conclusions he had drawn in 1996: they did not apply to regional bodies vested with powers to make binding decisions (European Court of Human Rights, Inter-American Court). While he still had doubts about the merits of some decisions by those bodies, 38/ he recognized that the stronger solidarity at the regional level than at the universal level could warrant the establishment under regional treaties of machinery with broader powers which reflected precisely those community ties. 39/

37/ Vienna Convention, art. 11.

38/ *Belilos*, *Weber Loizidou* cases.

39/ Even in such a context, the Special Rapporteur pointed out that some "decisions" of those bodies had produced many hesitations or reactions on the part of the States concerned, as was true of Switzerland in the *Belilos* case.

42. Those regional solutions could not, however, be transposed to a global level: "decisions" of that type by bodies which, like the Human Rights Committee were not given decision-making powers by the States parties, would be contrary to general international law.

43. In that case, the consequences that the reserving State could draw from the findings of monitoring bodies were the following: 40/

(a) The State could do nothing, although that was not all what was to be expected of a law-abiding State;

(b) The State could withdraw its reservation;

(c) The State could "regularize" its situation by replacing its impermissible reservation with a permissible reservation.

44. Lastly, the Special Rapporteur objected to the excessive pretentions of the Human Rights Committee in seeking to act as the sole judge of the permissibility of reservations. Such a control on the permissibility of reservations, he emphasized, was not the monopoly of the monitoring bodies. States, through objections, could exercise another kind of control and such "duality" of controls would make for still more effective operation of the treaty; moreover, objections by States were often not only a means of exerting significant "pressure" but also a useful guide for the assessment of the permissibility of a reservation by the Committee itself.

(viii) Draft resolution

45. The Special Rapporteur proceeded to introduce his proposed draft resolution, which was attached to his second report and concerned reservations to multilateral normative treaties, including human rights treaties.

46. He explained that the draft included the main conclusions contained in his two reports.

47. As to the form of the conclusions, namely a draft resolution, he stressed that the question under consideration was well suited to that particular form, but it did not of course exclude other alternatives whereby the Commission, as the body for promoting the progressive development and codification of international law could adopt a position on general problems regarding reservations.

40/ Second report, paras. 241-251.

48. The Special Rapporteur suggested that the draft resolution could be adopted at the Commission's forty-ninth session and then transmitted, for comments, to States and possibly to the human rights bodies concerned. The Commission would come to a final decision in the light of their reactions.

(b) Summary of the debate

(i) General comments

49. The members of the Commission commended the Special Rapporteur on his report. It was said that the topic constituted one of the fundamental aspects of international law.

50. Some members wondered whether it was advisable to consider reservations to human rights instruments at that stage, which did not seem to them to follow the Commission's usual procedure.

51. Several members also expressed agreement with the Special Rapporteur's view that it was necessary to preserve the achievements of the Vienna Conventions, which, moreover, codified the larger part of the customary rules. Some members emphasized that the Vienna regime, despite some ambiguities had worked remarkably well thanks to its flexibility and adaptability and had struck a balance - which should not be upset - between the integrity and the universality of treaties. It was also maintained that, even though the regime was not entirely satisfactory, it seemed difficult to devise a better one.

52. As to the doctrinal quarrel between the permissibility school and the opposability school, the Special Rapporteur, in reply to a question by a member who wondered whether it would not be possible to reconcile the two points of view, said he had considered bringing them closer together in his first report, but he increasingly doubted whether it was possible to reach any result, for each school had its own way of looking at the matter. According to one point of view, the opposability doctrine was a better reflection of the fact that States were the real "masters" of treaties. From that standpoint, compatibility with the object and purpose of the treaty could nonetheless serve as a guide for accepting or objecting to a reservation. The discussion then moved on to the following subjects.

(ii) Historical background

53. The idea was raised that the rules of the 1969 Vienna Convention on reservations were the result of a package deal between the Soviet position,

which had favoured a virtually unlimited right of States to make reservations, and the more flexible Western position. Some members who had taken part in the Conference none the less rejected the idea of such a compromise.

54. The Special Rapporteur noted that, although no "bargaining" could be inferred from the records of the Vienna Conference, it was possible to believe that a balance had been laboriously constructed between the two blocs.

55. Moreover, he pointed out that, even though the clauses on reservations in the 1969 Vienna Convention were the outcome of a last-minute compromise, that had not prevented the system from working satisfactorily. Indeed, the specificity of the law lay in the fact that once the rule was adopted it applied to all, including the big Powers. In that connection, he observed that, at the present time, the third world States were as much attached to the Vienna regime as were the industrialized countries.

56. The opinion was also expressed that the situation in respect of reservations had changed since the time when the Vienna Conventions had been adopted and when the socialist countries, with the support of the developing countries, had insisted on the right to make reservations. The general view was, however, that the issue was not one of opposition between developed and developing countries (North/South), since the technique of reservations was used by both for a variety of reasons.

(iii) Ambiguities and lacunae of the Vienna regime

57. Acknowledging that the lacunae of the Vienna Conventions should be filled and their ambiguities dispelled to the extent possible and within the existing framework, some members nevertheless drew attention to the complexity and the highly political nature of the topic.

58. According to one point of view, the political context which was the basis of the reservation procedure was essential and, in many cases, decisive as a means of assessing the relationship between the reservation itself and the instrument to which it referred. That dimension of the treaty and of reservations as acts promoting and expressing political interests had appeared more clearly in the waning twentieth century, when the great diversity of international society necessarily reflected the wide range of positions taken.

59. One member even pointed out that reservations had already been in use in connection with the conclusion of multilateral treaties in the nineteenth century (1890 General Act of the Brussels Conference dealing with the abolition of slavery and 1899 and 1907 Hague Peace Conferences).

60. Another member said that the Vienna regime, including the theory of reservations, gave an accurate view of international law from the standpoint of the big Powers, as it had developed during the cold war. He had questioned whether the regime was still appropriate and whether, instead of confining itself to summarizing the current state of international law, the Commission should not engage in progressive development and reconsider the regime.

61. According to some members, moreover, attention should be paid to the impact of reservations on treaties and to their possible role as a source of customary rules that would be alternatives to the rules created by treaties. Several aspects of the procedure for formulating reservations and objections, as well as the method of determining the permissibility of reservations, gave rise to considerable problems. One member expressed the opinion that the Special Rapporteur had rightly emphasized the particular regime of multilateral treaties, which reflected the interests of the international community as a whole.

62. Other members pointed out that, despite the relevant provisions of the 1969 Convention on reservations (particularly art. 19), the consideration of the "permissibility" of reservations, especially those alleged to be contrary to the object and purpose of the treaty, gave rise to great confusion because there was no single authoritative body which might take a decision in the matter and because each State made such a determination itself. The unity of the treaty was thus destroyed as a result of the establishment of a complex network of bilateral agreements. There was no denying the value of the Vienna rules, but they were complicated and sometimes difficult to understand. Reference was also made to the possibility that the depositary might have the power to monitor the permissibility of reservations.

63. With regard to the question of reservations to the provisions of a treaty restating a rule of customary law, the members who spoke agreed with the Special Rapporteur that that type of reservation was permissible in principle. Some considered that that was possible even in the case of provisions reproducing rules of jus cogens. In that case, however, the reservation could relate only to the refusal of the State to agree that those rules (of customary law and of jus cogens) should be incorporated in a conventional text. Often, in such cases, however, the reservation would be impermissible because it would be contrary to the object and purpose of the treaty. According to another point of view, the rules of jus cogens remained

peremptory no matter what States agreed among themselves. A reservation to such rules would have no effect. In that connection, it was stated that, regardless of whether States became parties to a treaty, customary international law would continue to govern the subject matter of such treaties. In that context, some members again raised the basic question of the definition of customary international law and the existing differences of opinion about the interpretation of that concept. They stated that reservations existed only as a response to such uncertainty. The Special Rapporteur pointed out that there could be reservations both to peremptory rules (*jus cogens*) and to customary rules. In the first case, a State could object only to the inclusion of the rule in a treaty without dealing with the substance of the law, while, in the second, the reservation could relate to the very substance of the rule because States could always derogate from customary rules by agreement *inter se*. 41/

64. According to another opinion, the Vienna regime was a system which operated "*faute de mieux*" and some aspects of which were not entirely satisfactory, particularly if account was taken of the historical context. It was pointed out that the Vienna rules were not only incomplete, as, for example, with regard to the *effects* of prohibited reservations, but also contained obvious illogicalities relating, for example, to the effects of acceptances of and objections to reservations which might lead to the same result. The question whether provisions relating to reservations were applicable *only* to permissible reservations or *also* to prohibited reservations had not been answered either. In the first case, the Vienna regime did not contain rules applicable to prohibited reservations and that was a major lacuna. In the second case, the result was a bundle of bilateral treaties, and that was not a very satisfactory solution, especially for certain categories, including human rights treaties. In that connection, one member expressed the opinion that article 19 of the 1969 Convention was a kind of threshold establishing the legal requirements for *permissible* reservations. In its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had already paved the way for the establishment of a "threshold" for the permissibility of reservations. Accordingly, articles 20 to 23 related only

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41/ See para. 145 of the second report (A/CN.4/477/Add.1).

to permissible, and not to prohibited, reservations. In that connection, article 19 drew no distinction between reservations that were incompatible with the object and purpose of the treaty and reservations that were prohibited by the treaty itself: impermissibility was always the same. It was therefore not conceivable that a State which, for some reason or other, remained silent in respect of a prohibited reservation should be deemed to have accepted it. It was maintained that it must be considered that such a State had reserved its rights under general international law as formulated in article 19. From that point of view, the acceptance and objection procedure still had a considerable role to play in the context of permissible reservations.

65. Another member pointed out that the concepts of the object and purpose still had to be clarified. In the absence of substantive rules, procedural rules were undeniably useful. In that connection, there was a "decentralized" system based on the individual reactions of States and a centralized system entrusted to a monitoring body.

66. Reference was made to the possibility that States might declare that a reservation had no legal effect and did not affect the obligations of the reserving State under the treaty. In the case of general reservations, a State might declare the reservation impermissible and request the reserving State to provide additional information designed to ensure that such a reservation was compatible with the object and purpose of the treaty. The composition of the bodies responsible for centralized systems and the effects of their recommendations offered a wide range of possibilities, such as an effect erga omnes or an effect that was strictly limited between two parties.

67. As to the consequences of a finding of impermissibility, some members stressed that, although the withdrawal of a State from a treaty was not provided for in the Vienna Convention, it was based on the underlying principle of consent. If the State opted to reformulate its reservation, it could do so only in the context of its obligations under the treaty. However, if the State did not intend to become a party to the treaty, its original reservation and its initial consent had to be regarded as null and void. The reformulation would have a retroactive effect. According to that point of view, the Commission would have to give further thought to the exact arrangements for such procedures and to those extremely complex issues.

68. The Special Rapporteur expressed his agreement with the idea that, if the State recognized *a posteriori* that it had formulated an impermissible reservation which it agreed to change, it was entirely free to consider itself bound by the treaty *ab initio*. If it also considered that the reservation was a condition for its acceptance, it could then consider that it had never been bound by the treaty. In any event, it was for the State itself to decide.

69. According to one point of view, reservations to bilateral treaties were also assuming greater importance, as demonstrated by the practice of the Senate of the United States and the Russian Parliament, and showed that new trends were taking shape. From that point of view, that question therefore warranted more in-depth consideration, particularly as the Vienna Conventions did not prohibit reservations to bilateral treaties. According to other members, reservations to bilateral treaties were actually a refusal to conclude the treaty or a proposal for the reopening of the negotiations. Some members nevertheless questioned whether reservations to bilateral treaties really formed part of the topic and whether reference could be made to reservations to that type of treaty. The Special Rapporteur explained that part II (e) of the provisional outline of the study 42/ should be understood as a question and not as a statement. He intended to proceed deductively by asking questions and, through a study of practice, doctrine and jurisprudence, seeing what the answers would be.

(iv) Definition of reservations and interpretative declarations

70. Several members stated that they were in favour of the consideration of that question. They said that the distinction between reservations and interpretative declarations could give rise to problems particularly because of the lack of definitions and specific rules, pointing out that the nature and effects of interpretative declarations that were obviously contrary to the treaty still had to be studied.

71. One member expressed the view that it might be possible to go beyond the usual criterion of distinction, which generally related to the object, and focus on the function of those two "techniques" in relation to a system which States and other bodies planned to join while defending their own interests.

42/ Doc. A/CN.4/477, para. 37, part II (e).

72. Another member took the view that the question of the distinction between reservations and interpretative declarations should definitely be discussed, since there was no excuse to use such declarations as disguised reservations. Some members were of the opinion that interpretative declarations as such should not be included in the study. In that connection, the Special Rapporteur considered that the problem should be dealt with in greater depth, even if it was obvious that interpretative declarations were not reservations.

(v) General outline and form of the results of the study

73. Some members questioned whether the guide to practice proposed by the Special Rapporteur did not involve a gigantic and extremely complex task. He would also have to take account of the trends and practice that had developed both at the regional and at the universal levels. Those members also asked what authority the guide would have in relation to the Vienna treaty regime, since it would not have binding force.

74. In the opinion of some members, the Commission's task would be to formulate generally applicable rules designed to facilitate the settlement of legal disputes and guide States in legally uncertain situations, as, for example, in the case of reservations to human rights treaties.

75. Other members were in favour of that approach, but had doubts about the practical value of specific clauses, since the "law-making" period was now over, especially with regard to human rights. They said that, if there were no new human rights treaties, such clauses could not be used.

76. Amendments to existing treaties would, moreover, be time-consuming and laborious. It was stated that one possibility might be to establish a fruitful dialogue between States and treaty monitoring bodies that would lead to solutions acceptable to all interested partners.

77. One member asked whether model clauses might be applicable to very different situations and whether ad hoc rules and regimes might not be preferable.

78. The Special Rapporteur replied that, even if that were correct in the abstract, it was not true at the normative level, since the Vienna regime had universal support, including that of human rights bodies.

79. Other members said that they agreed with the idea of a guide also containing the relevant provisions of the Vienna Conventions and model clauses accompanied by commentaries. They recalled that the Vienna Conventions had

entered into force after a fairly long period of time and that confusion should not be created by adding other instruments of the same kind. The solution offered by the guide, which would be of a residual nature, had undeniable advantages of flexibility, while leaving the Vienna system intact. It might fill the gaps in that system and, in the course of time, become a locus classicus on questions left unanswered by the Vienna Conventions.

80. With regard to the authority or "binding force" of such a guide, the Special Rapporteur explained that he did not view international law as a succession of obligations and prohibitions; if well-designed, directives and prohibitions could have an impact on the conduct of States. Thus, if the Commission could reach agreement as part of a consensus or near-consensus on important explanations, they might carry a great deal of weight with States.

(vi) Legal regime of reservations to treaties and normative treaties, including human rights treaties

81. Many members endorsed the Special Rapporteur's conclusion 43/ that the reservations regime established by the 1969 and 1986 Conventions was generally applicable to all multilateral treaties, regardless of their object, 44/ and hence to normative treaties, including human rights treaties. It was pointed out that the regime subsequently established by the Vienna Convention had been known to States at the time of the adoption of some human rights instruments and the absence of specific provisions on reservations in those instruments had therefore been intended. Some members, who had taken part in the 1969 Vienna Conference, confirmed that that regime had even been designed to be generally applicable to all treaties. They also stressed that what had to be avoided was precisely the proliferation of specific legal regimes on reservations that depended on the nature of the legal instruments in question, since that would lead to confusion and the fragmentation of the rules of law. It was noted that all facets of the question of the unity of those rules should be studied and that it might be necessary to formulate specific rules applicable to specific situations.

43/ See para. 163 of the second report.

44/ With the exception of "limited" treaties and constituent instruments of international organizations, for which limited derogations had been provided. See para. 163 of the second report.

82. The Special Rapporteur said that, in his view, the excessive fragmentation of rules would be the very negation of general international law.

83. Several members expressed divided views on the question of the definition of the normative nature of some multilateral treaties. It was pointed out that multilateral treaties constituted a very heterogeneous concept comprising various categories of treaties and even differences within the category of so-called "normative" treaties. For example, alongside synallagmatic treaties, there were treaties that established uniform legal standards, such as human rights treaties, and others that contained obligations in respect of all parties, erga plures. Normative treaties came under those two types of instrument, but it would be difficult to make a precise distinction. Treaties establishing a monitoring system to guarantee respect for rules and the effectiveness of their implementation might form a particular category. Their complexity and that of the role of the bodies they set up in respect of reservations to them were a relatively recent problem and it could not be considered that all normative treaties formed part of the category of law-making treaties.

84. One member pointed out that the question of reciprocity as a particular feature of treaties came into play in the case of all "normative" treaties, since any treaty norm might give rise to State responsibility where it defined unlawful conduct. If a State excluded a provision by means of a reservation, another State party could no longer allege a breach of that provision, but, at the same time, the reserving State could not, on the basis of reciprocity, allege the breach of that same provision by a State which had not made a reservation.

85. The opinion was also expressed that the exclusion of the question of limited treaties from the scope of the study covered in the second report and of the role of international organizations, both as parties to and as depositaries of treaties, was not appropriate, especially in view of the possible fragmentation of the Vienna rules. The analysis of the problem of the unity or diversity of the legal regime of reservations would be thereby enriched.

86. With regard to the question of the applicability of the Vienna regime to human rights treaties, several members agreed with the Special Rapporteur's

conclusions 45/ that that regime was generally applicable to them. It was nevertheless pointed out that that was a controversial matter which could not be settled until the end of the study, since the "unity" of the legal regime of reservations to treaties was not satisfactory and was a major lacuna in the Vienna Conventions. In the view of some members, the Vienna regime was general and embryonic and allowed the establishment of special regimes, 46/ especially as a result of its lacunae and uncertainties. They said that, by their very nature, human rights treaties even formed a separate category.

87. The weaknesses of the regime became even more apparent in the particular case of human rights treaties, where the inter-State system could simply not operate because it would lead to absurd results and because the reciprocal non-implementation of a provision would not have a limited effect on the reserving State only, but would constitute a breach of the treaty vis-à-vis all States parties. Consequently, their particular nature and the indivisible character of the obligations they embodied should be studied separately, if only in order to draw some conclusions about the general system of reservations. In that connection, some members pointed out that States frequently and knowingly formulated reservations contrary to the object and purpose of such treaties in the knowledge that the other States would not challenge them. General Comment No. 24 had been done as a result of that situation and not in order to attack States. The lack of penalties for "impermissible" reservations enabled all States to become parties to such treaties without really committing themselves. The Vienna system therefore called for an in-depth study by the Commission of the practice of States in respect of human rights treaties. It was also noted that, even when they had objected to such reservations that were contrary to the object and purpose of the treaty, States had rarely excluded the application of the treaty as between them and the reserving State.

88. One member also drew attention to the distinction between reservations and derogations from some human rights treaties, as expressly provided for by such treaties for times of states of emergency.

45/ Para. 176 of the second report.

46/ See para. 80 above.

89. The Special Rapporteur recalled that the problems to which reservations contrary to the object and purpose of the treaty gave rise were a gap in the Vienna Conventions and were not at all confined only to the field of human rights, but arose in the same terms for all multilateral treaties. He pointed out that the Commission seemed to be divided on whether there should be a regime for human rights instruments. He nevertheless thought that those who were in favour of a specific regime for such instruments were moving from the normative level to the institutional level for lack of normative arguments. Even if an institutional problem was involved, the Commission should not hesitate to deal with it. He also acknowledged that an extremely promising track was being opened up by the comment that the problem of reservations contrary to the object and purpose of the treaty arose in the same way as that of reservations prohibited by the treaty. 47/

(viii) The role of monitoring bodies in respect of reservations

90. Several members pointed out that developments in human rights since 1969 and the gradual increase in the authority of such bodies had probably led to the expansion of their functions, which had not been provided for at the time of their establishment. One member had even asked about the exact nature of those bodies, which was far from having been clearly defined.

91. Some members said that they were bodies whose role in that regard was relatively new and had expanded primarily after the cold war period. Their practice had developed in the field of the determination of the permissibility of reservations, especially at the regional level. The case law of the courts was fairly abundant and in principle accepted by the States of the region which were at a higher level of integration and had given them broader powers, without, however, avoiding some reactions on the part of the States concerned. That practice could nevertheless be transposed to the global level and its extent was open to discussion, despite the attempt along those lines made by the Human Rights Committee in its General Comment No. 24, since that body had no decision-making power and merely formulated general comments. It was doubtful whether monitoring bodies without decision-making power could monitor the permissibility of reservations. Moreover, the fact, that they could carry out such monitoring several years after the formulation of the reservation would jeopardize the stability of treaty relations.

47/ See para. 63 above.

92. According to another view, the recent proliferation of such bodies and the role they had arrogated to themselves in regard to reservations contributed to the confusion already created by some uncertainties in the Vienna regime. The duality mentioned by the Special Rapporteur was not really necessary. In principle, it was for States alone to proceed to determine the permissibility of reservations, their consent being the linchpin of the law of treaties and the foundation of the principle pacta sunt servanda. That was in keeping with the realities of international relations; the bodies monitoring universal human rights conventions did not have such competence unless it was expressly attributed to them by the States parties. They should therefore function strictly in conformity with their mandate. Their positions derogated too much from the generally accepted rules of international law and could even discourage States from becoming parties to human rights treaties. The human rights regime should admittedly be strengthened, but it should not be done at the expense of the law of treaties. According to that view, the arguments advanced by universal bodies to back up their competence to assess the permissibility of reservations were political rather than juridical. One member considered that those bodies could perhaps give an opinion or make a recommendation, but not pronounce on the permissibility of reservations. If, ultimately, doubt still remained about the exact scope of their competence, the General Assembly could ask the International Court of Justice for an advisory opinion. Furthermore, the possible interdependence between the acceptance and the admissibility of reservations should not be overlooked. In that respect, only States had definite powers and the part played by the acceptance of reservations by States was decisive.

93. Other members thought, conversely, that the recent practice of monitoring bodies deserved to be borne in mind. Since the machinery to check the permissibility of reservations between States did not function satisfactorily, it was incumbent on those bodies to ensure proper implementation of the treaty of which they were the guardians, something which, moreover, a number of them did with a great deal of courage, particularly at the regional level. They also emphasized the complementarity of the monitoring by treaty bodies and by States where States reacted properly to reservations incompatible with the object and purpose of the treaty, and they stressed the advisability of closer cooperation between States and monitoring bodies in connection with determining the permissibility of

reservations. They also favoured the idea that the Commission might proceed to consult the monitoring bodies and the General Assembly before reaching further conclusions. The Special Rapporteur, while acknowledging the progressive development of their practice, emphasized that it sometimes entailed sharp reactions by Member States. He also noted that most members of the Commission seemed to consider it would be unwise to venture into the field of regional human rights rules.

94. According to one view, collaboration between States parties and monitoring bodies could provide the basis for a possible solution to the problem of reservations and the lacunae in the Vienna regime. Other members contended that article 20, paragraph 2, of the International Convention on the Elimination of Racial Discrimination was one example of that "collegiate" system of monitoring reservations, the advantages lying notably in the direct participation of the States parties in that process. Similar clauses could be inserted in treaties, including human rights treaties.

95. Some members said that two basically different aspects should not be confused: first, the reservations regime, which was a normative matter, and second, the functions of the monitoring bodies, which were more of an institutional matter. States were free to act as they saw fit in regard to the findings of monitoring bodies, but there was no doubt about the right of regional or international bodies to develop their practice or to create precedents. It was suggested that the Commission should take up only the first aspect.

96. According to another view, those two aspects were closely linked, since some human rights treaty monitoring bodies proceeded to assess reservations and went so far as to "sever" the reservation from a State's consent to be bound by the treaty, in cases where the reservation was perceived by those bodies as being incompatible with the object and purpose of the treaty. At what point was a decision of a monitoring body _ultra vires_? Accordingly, the Commission should consider the basis for that competence of the monitoring bodies, its limits and, far from remaining neutral, should set itself the task of taking a decision on that problem, which could endanger the Vienna system.

97. Discussing the _basis_ or origin of reservations to be considered by monitoring bodies, some members said it should not be forgotten that a reservation was often an indication of circumstances, of time-frames and conditions in which a State would fulfil the obligations entered into.

Moreover, a related problem was that of invoking internal law as the basis of the reservation. Since the Vienna Convention prohibited such a course (art. 27) as justification for failure to perform a treaty, that rule could be transposed to reservations.

98. In the matter of the consequences of the findings of monitoring bodies, some members were of the view that the procedure and possible options presented by the Special Rapporteur 48/ deserved to be gone into further and to be thoroughly examined. If the reservation was incompatible with the object and purpose of the treaty, the State concerned should redefine the reservation so that it became permissible. It was pointed out that the Vienna Convention was silent in that regard; more particularly it was incumbent on the State to make its attitude clear, namely, either to admit that it still considered itself a party to the treaty and consequently reformulate its reservation in narrower terms, or formally withdraw from the treaty. Whether the effects of the new formulation of the reservation were retroactive or not also raised complex questions. According to one view, as far as human rights treaties were concerned, it could well be presumed that the State was a party to the treaty until the reservation was reformulated or clarified.

99. In addition, attention was drawn to the difficulties posed by the pure and simple severing of the reservation from the State's consent to be bound by the treaty advocated by some monitoring bodies. Some members said that, while that was not in conformity stricto sensu with the Vienna rules, nothing prevented the progressive development of international law from moving towards a doctrine of severability, above all in regard to some "objective duties", as was the case in the context of the European Convention on Human Rights. It was also said that severability, supported by the jurisprudence of those bodies, could be regarded as an appropriate sanction for a manifestly impermissible reservation. According to another view, the question was not whether the reservation could be severed from the treaty, but rather a question of interpreting the State's intentions. The severability of the reservation from the State's consent to be bound by the treaty was unacceptable and affected the free will of States. In the view of those

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48/ See the second report (A/CN.4/477/Add.1), paras. 244-252.

members, any problem pertaining to reservations should be solved, in the absence of a relevant clause, by a conventional dispute settlement mechanism.

100. Several members agreed with the Special Rapporteur's conclusion that monitoring bodies should be competent to assess the permissibility of reservations in the context of their function of monitoring the implementation of the treaty. Hence they should have the requisite powers to fulfil that role, powers that could be implicit or explicit. According to one view, the competence of monitoring bodies could be determined only in the light of their constituent instruments. In that respect, some members recalled the theory of implicit powers and analogies with the practice of the United Nations Security Council in connection with the interpretation of Article 27, paragraph 3, of the Charter. Mention was also made of Article 31, paragraph 3, of the Vienna Convention in contending that the practice of a body, if it had the consent of States, could be justified even in the absence of express clauses. To their mind, that aspect raised issues broader than reservations to treaties and touched on the Commission's attitude to certain developments in international relations. Other members, however, were of the opinion that the principle of effectiveness should not be regarded as a panacea.

101. Some members nonetheless emphasized that, even if monitoring bodies had powers to express an opinion on the permissibility of reservations, they could not go further and regard the reservation as null and void or draw the consequences of such a finding and thus assume some creeping jurisdiction. Those members also stressed that monitoring bodies should confine themselves to drawing reservations to the attention of the States concerned. It was for States to act and to take any appropriate decision, either by reformulating their reservation so as to make it "permissible", or if it was a sine qua non of their consent to be bound, to withdraw from the treaty.

102. Some members, while acknowledging the complexity of the problem of the role of monitoring bodies, emphasized the importance of those bodies and their decisions, both at the regional and at the international level, as well as their "coexistence" with the Vienna regime, which moreover, they regularly applied. In that connection, they considered that the Commission's position towards them should be strict neutrality in view of their autonomy and their special features, particularly since the field was the delicate and sensitive one of human rights.

103. The Special Rapporteur pointed out that the Commission should take account of trends at the regional level, but should not pronounce on their merits. The osmosis between regional rules and universal norms would not fail to broaden the Commission's approach from the standpoint of the progressive development of international law. As to monitoring bodies at the universal level, although some members had expressed doubts about the advisability and the possibilities of proceeding to consult them, particularly because of their so-called "intransigence", the idea of consulting the bodies concerned seemed to him to be worthwhile and profitable as a means of maintaining the unity of international law, on which nobody had a monopoly, and of bringing it into line with the needs of international society as a whole.

104. The Special Rapporteur therefore fully endorsed the idea of consulting the human rights bodies, something which was, he pointed out, entirely in keeping with the spirit of article 17, paragraph 2 (b), and article 25 of the Commission's Statute.

105. On the conclusion of the debate, at the 2503rd meeting, held on 2 July 1997, the Commission decided to transmit the draft resolution to the Drafting Committee without having taken a final decision as to the form of the text. At its ... meeting, the Commission considered the report of the Drafting Committee and adopted the (resolution), the text of which is reproduced below.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER V

RESERVATIONS TO TREATIES

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B. Consideration of the topic at the present session .....

GE.97-62893 (E)

105 bis. The Commission considered the report of the Drafting Committee at its 2509th, 2510th and 2511th meetings, held on 10, 11 and 14 July 1997, and adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, the text of which is reproduced in section C below.

106. With regard to the form of the text, some members expressed doubts about the somewhat unusual procedure adopted by the Commission in dealing with the text submitted to it. They argued that the procedure was premature at the present stage of the Commission's work on the topic. In their view, the text crystallized positions which were not yet entirely clear-cut and which might subsequently be changed. However, several members endorsed the idea that, given the advisability of submitting specific results of the Commission's work and in view of some recent questions about the exact role of the monitoring bodies of certain human rights treaties, the Commission was fully justified in adopting a position. Precisely in order not to prejudge any future orientations or conclusions, the Commission decided that the text should be entitled "Preliminary conclusions".

107. Some members stressed that they disagreed with the principle stated in paragraph 5 that, in order to carry out the functions assigned to them, the monitoring bodies established by treaties were competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations. They referred to certain bodies established by treaties in a regional context which might have members from States that were not parties to the treaties establishing the bodies in question. They were also not convinced that paragraph 12, a "saving clause" on regional bodies, was enough of a counterweight to the principle enunciated in paragraph 5.

108. Without going into the substance of the issue, other members took the view that paragraph 12 was broad enough to cover all cases of rules and practices developed within regional contexts.

109. Some members expressed their concern about paragraph 12, which could give rise to divergent interpretations. They took the view that any differentiation between certain reservations regimes in regional contexts was the consequence of the Vienna regime, which had to be considered generally applicable, even though results might not always be the same. They also stated that

paragraph 12 should not be understood as authorizing States to apply conventions of a universal character, particularly in the human rights field, in a differentiated and "regionalized" way.

110. They pointed out that the regional regimes in operation could not be viewed as separate from universally recognized practices and rules.

111. Other members expressed the concern that paragraph 12 might establish a hierarchy of rules and practices within which regional rules would take precedence over universal rules. They were of the opinion that respect for the Vienna Conventions should be established without ambiguity. According to one point of view, the paragraph could be deleted because nothing in the preliminary conclusions was contrary to regional rules and practices.

112. Other members were in favour of the retention of paragraph 12, which they regarded as essential to the balance of the conclusions as a whole. They pointed out that the wording of the paragraph was completely neutral and could not be construed as the adoption of a position on regional practices.

113. In their view, the 1969 Vienna Convention contained nothing peremptory or "sacrosanct", as was, moreover, clearly demonstrated by its residual nature. It was also noted that paragraph 12 left the door open, prejudging neither individual opinions nor the Commission's future positions in that regard.

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CHAPTER V

RESERVATIONS TO TREATIES

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C. Text of the preliminary conclusions adopted by the Commission

GE.97-62899 (E)

C. Text of the preliminary conclusions adopted by the Commission

114. The text of the preliminary conclusions adopted by the Commission is reproduced below:

PRELIMINARY CONCLUSIONS OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission has considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations. The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions

of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties;

7. The Commission suggests providing specific clauses in multilateral normative treaties, including in particular human rights treaties, or elaborating protocols to existing treaties to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;

10. The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty;

11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12. The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER V

RESERVATIONS TO TREATIES

Corrigendum

C. Text of the preliminary conclusions adopted by the Commission

Paragraph 7, 3rd line: Insert the words "if States seek" after the word "treaties" and before the words "to confer".